Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

NORMAN M. CHASE, RN,

*Petitioner,*

*v.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The United States Court of Appeals for the Federal Circuit decision 03-3185 declares that the Court lacks jurisdiction over mixed cases in which the employee is both challenging an adverse action and alleging that the action was based upon prohibited discrimination. The court retains jurisdiction only if a petitioner abandons the discrimination issue. The petitioner does not abandon the discrimination issue. The case background history and justifications for the finial decision are based upon ignoring the discrimination; upholding the "status quo" within the Indian Health System that supports discrimination towards nursing professionals who are not women. Since the Court of Appeals disqualifies itself from jurisdiction over mixed cases, the petitioner has no other recourse than to request review from the Supreme Court of the United States.

The questions presented are:

1. Whether the Court of Appeals properly barred the merit and validity of discrimination at the work place, Fort Belknap Indian Health Services in upholding the final order of the Merit Systems Protection Board Docket No.DE-0752-02-0185-l-1.

2. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based upon race, color, religion, sex, or national origin. The questions is did the United States Court of Appeals for the Federal Circuit properly identify the petitioner's status of being the only Native American Male RN employed at the Fort Belknap Indian Health Services, the duration of employment and the professional documentation of discrimination at the work place, balancing this status upon the evidence presented by the Department of Health and Human Services.

3. Prior to and since 9/11 the nation has and continues to have a critical shortage of Registered Nurses. Research at both the national

and local levels reveals discrimination towards men in nursing from their female peers, instructors, supervisors, patients and their families, which in turn creates a low retention rate in the profession. The question is did the Court of Appeals evaluate the seriousness of the decision's impact on the local, tribal, and National critical shortage of men in Nursing and specifically the minority within a minority, Native American Men in Nursing when denying consideration and acknowledgement of gender discrimination at the Fort Belknap Indian Health Services?

## PARTIES TO THE PROCEEDING

Petitioner Norman M. Chase, RN is a fifty-three year old Vietnam Era Veteran, one of four male Registered Nurses (RNs) that work for the Fort Belknap Indian Reservation Indian Health Service (FBIHS) in a staff of over twenty RNs. He is the only Native American male RN working in the FBIHS with over fifteen (15) years experience as a professional RN and thirteen (13) years at FBIHS. According to 2002 Montana State Board of Nursing Statistics the petitioner is one (1) of five (5) practicing licensed Native American male RNs in the STATE OF MONTANA where the total number of active RNs is 9163.

The Fort Belknap Indian Reservation is located in north central Montana in a sparsely populated rural area identified as a manpower shortage area, which has a prevalence of economic poverty, social dysfunction, alcoholism and drug addictions. The Billings Area Indian Health Service of the Department of Public Health and Human Services manages FBIHS. The personnel management staff is located approximately two hundred fifty (250) miles south of the northern Montana Indian reservation, in Montana's only metropolitan city. The area office is also staffed predominantly with women.

The Merit Systems Protection Board (MSPB), Docket No. DE-0752-02-0185-I-1 upheld the Department of Health and Human Services action to suspend the petitioner for thirty days (30) without pay for alleged discourteous and/or rude conduct at the workplace. The United States Court of Appeals for the Federal Circuit upheld the decision of the MSPB *Per Curiam*. The lower court also failed to acknowledge the failure of FBIHS to honor and take action upon the petitioner's formal request of August 18, 2001 to file an Equal Employment Opportunity Complaint.

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## STATUTORY PROVISIONS INVOLVED

1) Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin.

2) Civil Rights Act of 1991, which among other things, provides monetary damages in cases of intentional employment discrimination.

3) Civil Service Reform Act of 1978 (CSRA), which prohibits any employee who has authority to take certain personnel actions from discrimination for or against employees on the bases of race, color, national origin, religion, sex, age or disability. CSRA also prohibits reprisal against federal employees for exercising an appeal, complaint, or grievance right.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The judgment the United States Court of Appeals for the Federal Circuit, as filed on August 12, 2003 *A.D.*, before Michel, Clevenger, and Bryson, Circuit Judges. PER CURIAM appears at Appendix B ("Pet. App.")5a-10a), affirming the final order of the Merit Systems Protection Board, Docket No. DE-0752-02-0185-I-1, (Pet. App. A)1a-4a) upholding the decision of the Department of Health and Human Services to suspend the petitioner for 30 days without pay.

## STATEMENT OF JURISDICTION

Unlike nursing positions in the private or corporate arenas, Indian Health Service is a Federal position, therefore requiring the U.S. Court system vs. local and/or State Court jurisdiction.

## STATEMENT OF THE CASE

The Merit Systems Protection Board (MSPB), Docket No. DE-0752-02-0185-I-1 upheld the Department of Health and Human Services action to suspend the petitioner for thirty days (30) without pay for alleged discourteous and/or rude conduct at the workplace. The MSPB declined to consider gender discrimination of the incidents presented and the historical pattern the petitioner presented, along with written statements from physicians supporting a pattern of gender discrimination. The United States Court of Appeals for the Federal Circuit upheld the decision of the MSPB *Per Cur*iam, again declining to consider the rights of the petitioner to work without discrimination in his place of employment. The MSPB also failed to acknowledge personnel issues beyond the petitioner's control, holding the petitioner accountable for

the action and behavior of others. (Pet. App. B, 5a-10a) The lower court also failed to acknowledge the failure of FBIHS to honor and take action upon the petitioner's formal request of August 18, 2001 to file an Equal Employment Opportunity Complaint. (Pet. App. C, 11a)

Neglecting to address and/or acknowledge the merits of gender discrimination in this case places the petitioner at risk for further discrimination in the workplace, further disciplinary action and termination of employment. The disciplinary action was not taken for actions for violation of Patients Rights or Nurse Practice Act, but for "discourteous and/or rude conduct," which can be highly subjected to eschewed and biased testimony and opinions. Without considering the gender factors, the petitioner's right to a fair hearing have been obstructed by the suspension, and the decisions of MSPB and the U.S. Court of Appeals for the Federal Circuit.

The petitioner is a fifty-three year old Vietnam Era Veteran, one of four male Registered Nurses (RNs) that work for the Fort Belknap Indian Reservation Indian Health Service (FBIHS) in a staff of over twenty RNs, the majority being women in their early twenties to thirties. He is the only Native American male RN working in the FBIHS with over fifteen (15) years experience as a professional RN and thirteen (13) years at FBIHS. According to 2002 Montana State Board of Nursing Statistics the petitioner is one (1) of five (5) practicing licensed Native American male RNs in the STATE OF MONTANA where the total number of active RNs is 9163. Of the total number of RNs 676 are male, with only 5 being Native American. The Montana Board of Nursing also reports a three year total of complaints filed as 505, of these complaints 75 were filed against male RNs, none of which were Native American male RNs.(Pet. App. J and K) 19a-20a)

The Fort Belknap Indian Reservation is located in north central Montana in a sparsely populated rural area identified as a manpower shortage area, which has a prevalence of economic poverty, social dysfunction and chemical dependency issues found, unfortunately, on most U.S. tribal reservations. The Billings Area Indian Health Service of the Department of Public Health and Human Services manages FBIHS. The personnel management staff is located approximately two hundred fifty (250) miles south of the northern Montana Indian

reservation, in Montana's only metropolitan city. The area office is also staffed predominantly with women.

Unlike nursing positions in the private or corporate arenas, Indian Health Service is a Federal position, therefore requiring the U.S. Court system vs. local and/or State Court jurisdiction. The U.S. Court of Appeals for the Federal Circuit identified the case as *Per Curiam*, failing to consider or recognize the impact the action has on the nursing profession and men in nursing, especially during a national and international shortage of nurses. The Federal Circuit Court upheld the MSPB decision by justifying the allowance of hearsay statements and testimony on behalf of the Department of Public Health and Human Services (FBIHS), while discrediting the petitioner's documentation and written testimonies, including those provided by supervising medical physicians, as insignificant and invalid.

Petitioner now elaborates in detail as follows:

## ANSWERS TO THE QUESTIONS

### QUESTION 1

The United States Court of Appeals for the Federal Circuit decision 03-3185 declares that the Court lacks jurisdiction over mixed cases in which the employee is both challenging an adverse action and alleging that the action was based upon prohibited discrimination. The court retains jurisdiction only if a petitioner abandons the discrimination issue. The petitioner does not abandon the discrimination issue. The case background history and justifications for the finial decision are based upon ignoring the discrimination; upholding the "status quo" within the Indian Health System that supports discrimination towards nursing professionals who are not women. Since the Court of Appeals disqualifies itself from jurisdiction over mixed cases, the petitioner has no other recourse than to request review from the Supreme Court of the United States. The question presented is whether the Court of Appeals properly barred the merit and validity of discrimination at the work place, Fort Belknap Indian Health Services in upholding the final order of the Merit Systems Protection Board Docket No.DE-0752-02-0185-I-1.

## ANSWER 1

The United States Court of Appeals for the Federal Circuit, 03-3185, declares the lack of jurisdiction over mixed cases in which, "the employee is both challenging an adverse personnel action and alleging that the action was based on prohibited discrimination," retaining jurisdiction "only if the petitioner abandons the discrimination issue." The discussion and resulting decision continues upon the assumption that the petition therefore has abandoned the discrimination issue. This is done despite numerous references to the petitioner's testimony of discrimination in the workplace.

The failure of the local and/or regional EEO representative to process the petitioner's complaint request does not void the validity of or the existence of significant workplace discrimination, yet the Federal Circuit decision accepts the administrative judge's treatment that an EEO complaint was duly processed and considered in the Board's review. The administrative judge upheld the discrimination by upholding the woman-dominated workforce, without extensive examination of the historical and current personal and professional agendas, patterns of behavior, or gender issues within the work arena.

The following case examples further illustrate the issue:

A summer non-professional temporary ward clerk files a complaint that she considered the petitioner's behavior and/or statements to be "rude and argumentative," causing her undue stress.

The nursing supervisor and MSPB failed to consider the workplace arena and differences in job level perceptions, along with the temporary work status and limited experience of the ward clerk. The petitioner works as an outpatient and emergency triage nurse. This environment has a rapid ever-changing pace with a wide range of medical emergencies from minor to major crises. Unlike general office personnel, emergency room and out patient medical personnel must be alert and flexible at all times, with the ability to handle multiple tasks simultaneously. It is not out of the ordinary, nor "rude and argumentative" if and when emergency room triage staff speak or act in a rushed manor, especially if there is impending ambulance arrivals or walk-in emergencies expected. The behavior and actions of the petitioner, if indeed "rude

and argumentative," while on duty is not intended, nor to be taken, at a personal or professional level.

However, the supervisor taking the complaint did not address the situation as an opportunity to orientate the non professional to the emergency medical environment, rather chose to "discipline" the petitioner for behavior well within the expectations of staff in the emergency/out patient medical field. All, but the petitioner, in this case were women.

A clearer example presented to the MSPB of gender discrimination is provided with a handwritten statement by Suzanne Cochran, RN dated October 19, 1999 and a letter written to Cheryl Horn, patient's mother, by the petitioner dated October 7th, 1999. (Pet.App. D and E) 12a-13a) It is of note that the incident in question occurred on October 5th, the petitioner wrote a letter of explanation and apology on October 7th, yet the statement by nurse Cochran is not written until October 19,1999.

Throughout the appeal process the petitioner has charged that specific female leadership, in a consistent long-term bases, has solicited the complaints filed against him. Had this incident been of merit, why did it take over ten days for the report to be generated, rather than the standard of practice requiring an incident report be completed prior to leaving the shift in which the incident occurred? Both the MSPB and Federal Circuit Court upheld that the petitioner was not being selectively discriminated against despite this example of discrepancy in timely incident reporting by FBIHS staff.

Further examination of the incident supports gender discrimination. The complaint focuses upon a thirteen-year old Native American girl, a resident of the Fort Belknap reservation, being tearful and claiming the petitioner had, according to the written statement by nurse Cochran, "yelled at her (the patient)." Upon reading the October 7th letter from the petitioner, one learns that the youth behaved in a normal manner for a shy Native American girl on a sparsely populated rural reservation when approached by an adult Native American man. Under normal social conditions the petitioner would not approach the youth; however, due to the professional role and clinical environment and modality the petitioner had no other options available. The rational

and procedure described in the petitioners letter is within normal limits considering the age and genders of the patient and nurse. So why is this situation a matter requiring a formal complaint and disciplinary action? The nurses, patient, mother and nurse supervisor are all women with various discomfort levels when working with a male nurse. This discomfort is heightened when occurring within a small closely related Native American community/culture. Similar cases exist for the professional woman working in non-traditional professional settings, such as female physicians, female civil engineers, and females assigned to military combat duty.

Drs. William Bradshaw, David J. Abbott, and Ethel Moore, M.D.s provide written statements validating a continuance and history of gender biases towards the petitioner. (Pet. App. F, G, and H) 14a-17a.) Dr. Bradshaw provides a written statement that with nearly two years of working experience with the petitioner:

> "...I never observed Mr. Chase anyway showing even a suggestion of disrespect towards a patient or even another staff member...I have however perceived an overall negative perception within the Department of Nursing towards Mr. Chase...I have become increasing aware of an air of hypercritically towards Mr. Chase that seems incongruous with my experiences...I suspect that the perception of what has been said about the event with this 13 year old girl is strongly influenced by preexisting perceptions..." (Pet.App. F, 14a)

Dr. Abbott, with five years experience working with the petitioner observes in his written statement:

> " (petitioner's) professional abilities...(are) carried out...with competence and dispatch...I have noticed many instances of friction between (the petitioner) and his nurse colleagues. I have perceived that in most of these situations there have been disagreements about provision of backup when the need for nursing services exceeded his physical abilities." (Pet. App. G, 16a)

And finally Dr. Moore states:

> "(petitioner) can be assertive when he feels that he is right. He is supportive of the patient's rights, which can be offensive to some co-workers...the rules that apply to other nurses do not apply to (the petitioner)."

It is of note that Dr. Moore, a female physician, notes the discrimination and places these observations in a written statement. Yet these statements are ruled in the Federal Circuit as insufficient and solicited. The reviewer needs to consider the question regarding solicitation of statements provided in the first case presented here. What options and/or choices does a competent profession have available to address discrimination in the workplace, especially when dominated by the opposite gender?

## QUESTION 2

Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based upon race, color, religion, sex, or national origin. The questions is did the United States Court of Appeals for the Federal Circuit properly identify the petitioner's status of being the only Native American Male RN employed at the Fort Belknap Indian Health Services, the duration of employment and the professional documentation of discrimination at the work place, balancing this status has upon the evidence presented by the Department of Health and Human Services.

## ANSWER 2

In review of the Federal Circuit Decision there is no acknowledgement that a discriminatory environment exists at the Fort Belknap Indian Health Service. The Department of Public Health and Human Services personnel focus on the frequent historical need to "council" the petitioner, yet fails to address any other alternatives, such as group intervention, staff training and development on gender differences and/or communication. Such training is and has been required

of other institutions and professions; such as the military and state employee programs. Again the burden is placed upon the petitioner, without relief or fair appeal.

## QUESTION 3

Prior to and since 9/11 the nation has and continues to have a critical shortage of Registered Nurses. Research at both the national and local levels reveals discrimination towards men in nursing from their female peers, instructors, supervisors, patients and their families, which in turn creates a low retention rate in the profession. The question is did the Court of Appeals evaluate the seriousness of the decision's impact on the local, tribal, and National critical shortage of men in Nursing and specifically the minority within a minority, Native American Men in Nursing?

## ANSWER 3

Historically cases brought before local, District and Federal courts are predominantly issues of ethic/racial discrimination or women in the workplace, such as the introduction of female military personnel into barracks and later combat duties. The nursing profession has been female dominated long before Florence Nightingale.

The March 2000 National Sample Survey of Registered Nurses, 146,902 [5.4 percent] of the estimated 2.7 million RNs in the United States were men, recent figures from the U.S. Department of Labor show numbers as high as nearly 7 percent. In the August 27th edition of the national periodical Nurse Week an article titled Men at Work the topic of gender biases and discrimination in the nursing profession is brought forward into the national limelight. The article sites the need for an "attitude adjustment" by the nursing profession towards men who seek this nearly exclusively female profession. It is not uncommon for a nursing class of one hundred to have only one man enrolled. Once licensed as an RN, the man who works as an RN soon finds he must battle his peers to maintain employment, many seeking less hostile career environments by abandoning the profession altogether. Jerry Lucas, RN publisher of

Male Nurse Magazine, a magazine for male nurses that is expected to launch this fall, states, " We get them (men) in (nursing), but we can't keep them in." (Pet. App. L, 21a)

Prior to and since 9/11 there has and continues to be an acute worldwide shortage of nurses, which is projected to become much worse in the years ahead. (Pet.App. M, 30a) U.S. Senator Tim Johnson (D-SD) co-sponsored the Nurse Reinvestment Act to address the areas with critical nurse shortages in an effort to provide more opportunities to recruit and retain qualified nurses. The actions of FBIHS, the MSPB and the Federal Circuit Court fail to address this key issue facing the local, national and international crisis. Infractions against the Nurse Practice Act would be justification for the actions taken by FBIHS; however aiding and supporting discrimination towards gender, in a case that the Federal Court deems Per Curiam, can and may have a long range negative impact on the future of the nursing profession and availability of adequate staffing and services to the public as a whole.

In the petitioner's case the number of Native American males in Nursing is an additional "oddity." According to the U.S. Department of Education, National Center for Education Studies Trends in Enrollment in Higher Education by Racial/Ethnic, 1999, the curriculum for Native American Women focuses on traditional female occupations in Education, Nursing and early childhood care with a 2.0 enrollment rate increase, while the enrollment of Native American Men remains low within the overall –0.8 enrollment status, with additional limited enrollment in traditional female occupations.

Montana State University, Bozeman Montana currently has a three-year grant to assist in the nursing shortage on Indian reservations in Montana and the northwestern states under the project name of Caring For Our Own. Consider the following data found on the project web page supporting the need:

> The population density of the state overall is less than 5.5 persons per square mile. The state ranks 48th among all states in population density, with only Wyoming and Alaska having lesser population densities. Forty-six of the fifty-six counties are designated

"frontier." Fifty four of Montana's fifty six counties are non-metropolitan. Only two counties in Montana have urban concentrations of greater than 50,000, and there are only five population centers. They range in size from Billings, the largest, at 81,000, to Bozeman at 22,600. The total population living in these five cities is estimated to be 226,000. The remaining residents (574,000) are widely disbursed in 471 smaller communities and on farms and ranches.

The American Indian population, Montana's primary minority population, continues to grow in numbers and as a percentage of the total in Montana. There are 48,000 American Indians in Montana. This represents six percent of the population of Montana as compared to the national average of seven-tenths percent per state (Offner, 1992). American Indians in Montana confront serious and persistent health problems as well as economic and social hardships. The most prevalent health problems are complex and in some cases significantly greater than rates for the United States as a whole. Age-adjusted mortality rates for problems such as diabetes mellitus accidents, tuberculosis, alcoholism, for example, range from 200-66% greater than for the population as a whole. Malignant neoplasms and HIV infection are both lower than the U.S. rates. Leading causes of death in the Billings IHS Service Area, 1990-1992, 18.6 percent of all deaths were caused by diseases of the heart. This was followed by accidents (15.6), malignant neoplasms (15.6) and chronic liver disease and cirrhosis (5.1%).

The number of American Indian students enrolled in baccalaureate education in Montana has dropped sharply during the last ten years. Some of the decline is attributable to an increase in associate degree programs available. However, there is no corresponding increase

in the number of American Indian nurses enrolled in baccalaureate completion programs for registered nurses. http://www.montana.edu/nanurse/details.html

In review the enrollment to the program only one (1) Native American male had enrolled, demonstrating the continued lack of Native American men in the field of nursing and the problematic biases facing nursing on the reservations as well as nation wide toward men in the profession. As stated previously, the 2002 Montana State Board of Nursing Statistics verify that the petitioner is one (1) of five (5) practicing licensed Native American male RNs in the STATE OF MONTANA which has a total number of 9163 active RNs. Of this total only 676 are male RNs, with only 5 being Native American. The statistic provided from the Montana Board of Nursing reveal that of the 9163 Active RNs in Montana 92.62 % (8487) are women and 7.37 % (676) are men. The total percentage of Native American female RNs is 1.16% (107) of the total nursing population, while the Native American Men in nursing is represented by only 0.05% (5).

A higher percent of the Native American Registered Nurses are women, (95%) compared to the total of 92.62%. The total percentage of Men in Nursing in Montana meets the National Average (between 7-8 %) however, Native American Men in Nursing, compared to the number of Native American Women, are only slightly over half the National Average at 4.47 % of the Native American Nurses at five individual (5) male nurses. It is also of note that the total Nurse Practice complaints received and reviewed by the Montana Board of Nursing during the three-year period from 2001 to 2003 was 505. Of that total 75 complaints were filed against Male Nurses, yet there were no complaints filed during the same three-year period against Native American Men in Nursing. Yet the administrative judge and Federal Circuit court deny the preponderance of gender inequity and workplace discrimination supported through the petitioner's testimony and documented by professional witnesses.

## Reasons for Granting the Writ

**I**

The Federal Circuit Court declares lack of jurisdiction of mixed cases.

**II**

Both the Merit Systems Protection Board and the Federal Circuit Court failed to apply Title VII of the Civil Rights Act of 1964 (Title VII), Civil Rights Act of 1991, and Civil Service Reform Act of 1978 (CSRA).

**III**

The petitioner's right to file an EEO complaint was denied.

**IV**

The case has significant impact upon men in nursing and other non-traditional male professions at a local, state, national and international level, with high significance during a world-wide nursing shortage.

The Federal Circuit has decided important questions of federal Law and justice that have not been, and *should* be, finally settled by this Supreme Court, by exercising appropriate deliberation in this case.

## Conclusions

The petitioner's personnel file, used to document justification for a thirty-day (30) suspension without pay, validates the Native American professional male nurse's struggle against gender discrimination. Overwhelming statistics at both the state and national level verify the extremely low percentage rates of men licensed as professional nurses, and even fewer are Native American male nurses. Rather than aide in the documentation of gender discrimination evident by numerous frivolous complaints, the personnel file is used to support punitive action towards his professional career. This validates the day-to-day working conditions the petitioner must work in on a daily bases. By enacting monetary hardship, relocation or alternative career choices, rather than retention of a competent nursing professional, is often the

outcome. Furthermore written statements from Drs. Bradshaw, Abbott, Moore and Ogboh support the petitioner's competency as a professional nurse and address witnessed worksite discrimination. (Pet. App F, G, H, and I) 14a-18a)

The decision of the Merit Systems Protection Board (MSPB), Docket No. DE-0752-02-0185-I-1 and upheld by the Federal Circuit Court violates:

1) Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin.

2) Civil Service Reform Act of 1978 (CSRA), which prohibits any employee who has authority to take certain personnel actions from discrimination for or against employees on the bases of race, color, national origin, religion, sex, age or disability. CSRA also prohibits reprisal against federal employees for exercising an appeal, complaint, or grievance right.

This Petition for Writ of Certiorari should be granted.
Respectfully submitted,

Norman M. Chase, RN
Date: October 16, 2003 *A.D.*

# APPENDIX A: DECISION OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED JANUARY 21, 2003

***

## UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD DATED

NORMAN M. CHASE,
Appellant,

DOCKET NUMBER
DE-0752-02-0185-1-1

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Agency.

DATE: JAN 21 2003

Norman M. Chase, Harlem, Montana, pro se.
Kim Nicholson, Billings, Montana, for the agency.

**BEFORE**

Susanne T. Marshall, Chairman
Beth S. Slavet, Member

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115 (d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on you r discrimination claims. *See* Title 5 of the United States Code, sections 7702 (b)(1) (5 U.S.C. § 7702 (b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission

Office of Federal Operations

P.O. Box 19848

Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative received this order before you do, than you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on you r discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703 (b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative received this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination on based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5 (f) 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order

before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544(Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: s/Bentley M. Roberts, Jr.

Clerk of the Board

Washington, D.C. [1]

[1]The Petitioner filed an EEOC complaint on August 18, 2001. *See* APPENDIX C: MEMO TO VERONICA DILLON, EEO, INDIAN HEALTH SERVICE, FORT BELKNAP HOSPITAL, FORT BELKNAP, MT 59526,
August 18, 2001. The local and Denver EEOC offices, informing the petitioner that he had no other options, did not process the complaint. This action left the petitioner with only the Judicial Review option available for appeal.

## APPENDIX B: DECISION UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT DATED AUGUST 12, 2003.

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

03-3185
NORMAN M. CHASE,
Petitioner,
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

DECIDED: August 12, 2003

Before MICHEL, CLEVENGER, and BRYSON, Circuit Judges.
PER CURIAM.

### DECISION

Norman M. Chase appeals from the final order of the Merit Systems Protection Board, Docket No. DE-0752-02-0185-I-1, upholding the decision of the Department of Health and Human Services to suspend him for 30 days. We affirm.

### BACKGROUND

Mr. Chase is employed as a Clinical Nurse with the Indian Health Service, an agency within the Department of Health and Human Services ("HHS"). On October 18, 2001, HHS charged Mr. Chase with failing

to demonstrate courtesy and consideration, and informed him that it proposed to suspend him for 30 days. The charge was based on his conduct on two occasions. The first, on June 28, 2001, involved an allegation that Mr. Chase spoke inappropriately in front of a patient and made the patient uncomfortable. HHS found that when Joan LaTray, a reception nurse at the facility where Mr. Chase worked, brought a patient and the patient's chart to Mr. Chase, he told her, in a loud voice, "Well put him in a room" and "would you do your job and put him in a room." The record contains the complaint filed by Ms. LaTray regarding the incident. HHS also relied on submissions, including a counseling report, by Mr. Chase's supervisor, Kathleen McGuire. Ms. McGuire agreed with Ms. LaTray that Mr. Chase's comments were inappropriate and that it was his responsibility to place the patient in a room. Mr. Chase did not dispute that the incident had occurred, but claimed that his statements were taken out of context.

The second incident occurred on August 15, 2001, and involved a report by another employee, Audrey Hoops, who complained that Mr. Chase was rude and discourteous to her during an interaction concerning whether a patient's chart should be left in the reception area or taken to the walk-in clinic area. According to Ms. Hoops, when she tried to leave a chart in the reception area, Mr. Chase told her the chart was supposed to go to the walk-in clinic. When Ms. Hoops explained the reason for bringing the chart to the reception area, Mr. Chase refused to accept her explanation, told her she was wrong, and said that she should know where the charts are to be placed. According to Ms. Hoops, Mr. Chase then grabbed the chart from her and threw it into a cart. Another staff member, Simone Leo, who witnessed the incident, reported that Mr. Chase would not listen to Ms. Hoops's explanation and that he argued with her and ultimately grabbed the chart from her hands and threw it into the cart. In her complaint to her supervisor, Ms. Hoops stated that she considered Mr. Chase to have been rude and argumentative and that she should not have to work under such stressful conditions. Mr. Chase's supervisor, Ms. McGuire, approached Mr. Chase about the incident; he did not deny that it occurred but he denied that he was discourteous or rude. Mr. Chase has argued that his supervisors solicited the complaints regarding those incidents.

Through the deciding official, Jaloo Zelonis, HHS issued a decision effecting the 30-day suspension, and Mr. Chase appealed on the Board. The administrative judge assigned to the case held a hearing at which he heard testimony from Mr. Chase and Ms. Zelonis. With respect to the August 15, 2001, incident, the administrative judge also considered statements from Ms. Hoops, Ms. Leo, and Ms. McGuire. The administrative judge noted that Mr. Chase denied that he had been discourteous or rude during that incident but did not deny that the incident had occurred. After weighing the evidence, including statements submitted by Mr. Chase from other clinic staff members who were not present during the incident, the administrative judge concluded that a preponderance of the evidence supported the agency's conclusion that Mr. Chase had been discourteous on the occasion.

With respect to the June 28, 2001 incident, the administrative judge cited Ms. LaTray's written complaint, Ms. McGuire's counseling report, and testimony by Ms. Zelonis that she felt that Mr. Chase's remarks were discourteous and lacked regard for the patient. The administrative judge noted that Mr. Chase did not deny that the incident had occurred as described in HHS's letter of proposed action. Rather, Mr. Chase argued that it was inappropriate to penalize him based on a complaint that he contended was solicited by agency personnel. The administrative judge sustained the agency charge with respect to the incident and found that there was no evident in the record supporting Mr. Chase's allegation that agency officials had solicited the employee complaints.

The administrative judge also considered an allegation of prohibited discrimination by Mr. Chase, in which he argued that the female staff members discriminated against him because he was the only male Native American clinical nurse in his work area. Mr. Chase argued that the agency further discriminated against him by refusing to accept his EEO complaint regarding the issue. While Mr. Chase is a member of a protected group, the administrative judge concluded that Mr. Chase had not presented any evidence of disparate treatment and thus had failed to establish a prima facie case of prohibited discrimination. The administrative judge noted that the record showed that Mr. Chase had filed an EEO complaint, but held that the agency's dismissal of that

complaint does not establish that the action in this matter was based on prohibited discrimination. In sum, the administrative judge state that Mr. Chase "has failed to present any credible evidence to show that he was discriminated against based on gender and race/national origin, or that he was treated in a disparate manner when the agency suspended him for 30 days." Moreover, the administrative judge concluded that there was a legitimate non-discriminatory reason for the suspension.

Citing Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), the administrative judge determined that the penalty of a 30-day suspension was appropriate and reasonable under the circumstances. Mr. Chase petitioned for review by the full Board, which denied the petition.

## DISCUSSION

1

We must first address the issue of our jurisdiction. Mr. Chase argues to this court that he was "denied the right to file an informed EEO complaint" but that he has documentation that his EEO complaint was received by the local EEOC representative. The administrative judge treated Mr. Chase's allegation about the EEO complaint as both at claim of discrimination and a defense to the 30-day suspension.

This court does not have jurisdiction over mixed cases-cases in which the employee is both challenging an adverse personnel action and alleging that the action was based on prohibited discrimination. See Williams v. Dep't of the Arm, 715 F.2d 1485, 1491 (Fed. Cir. 1983) (en banc); Austin v. Merit Sys. Prot. Bd.,136 F.3d 782, 783 (Fed. Cir. 1998). This court retains jurisdiction, however, if a petitioner abandons the discrimination issue, Daniels v. United States Postal Serv., 726 R.2d 723 (Fed. Cir. 1984), or if the petitioner presents only a frivolous allegation of discrimination, Hill v. Dep't of the Air Force, 792 F. 2. 1469, 1470-71 (Fed. Cir. 1986) (holding that a frivolous allegation of discrimination before the Board does not create a mixed case for purposes of appellate jurisdiction).

The administrative judge held that Mr. Chase had not established a prima facie case of discrimination. Mr. Chase has not challenged any aspect of the administrative judge's analysis of that issue. Indeed, Mr.

Chase has not alleged facts that, even if proved, would establish a discrimination claim. We therefore conclude that Mr. Chase failed to present a nonfrivolous allegation of discrimination. As such, Mr. Chase's claim that he was denied the right to file "an informed EEO complaint" is insufficient to make this case a "mixed case" under 5 U.S.C.§7702 and deprive this court of jurisdiction over his petition for review. In addition, we do not find grounds outside of a discrimination claim for reversing the suspension based on the agency's treatment of his EEO complaint.

II

Mr. Chase argues that the administrative judge, in upholding the agency's charge of failure to demonstrate courtesy and consideration and the associated penalty, improperly relied on statements that were not made under oath. However, Mr. Chase has not referenced, nor are we aware of, any regulation specific to the Board that requires statements to be notarized or bars the Board from considering unsworn statements. We note that the Federal Rules of Evidence do not apply to Board proceedings, see Yanopoulos v. Dep't of the Navy, 795 F.2d 468, 471 (Fed Cir.1986), and that the Board's administrative judges may base their decisions on hearsay evidence if that evidence is credible and probative, see Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367, 1373 (Fed.Cir.2001); Kewley v. Dep't of Health & Human Servs., 153F.3d, 1357, 1364 (Fed. Cir. 1998); Sanders v. United States Postal Serv., 801 F.2d 1328, 1331 (Fed. Cir. 1986)("It is well established that hearsay evidence may be substantial evidence in an administrative proceeding if there are circumstances which give it credibility and probative value to a reasonable mind."). Mr. Chase has not shown that the hearsay statements considered by the administrative judge were unreliable or were outweighed by other evidence in the case. Accordingly, we conclude that the administrative judge did not err in considering the complainants' unsworn, out-of-court statements in assessing the agency's case against Mr. Chase.

Mr. Chase contends that "the material I presented was dismissed," but he has not identified any evidence that was overlooked or not considered by the Board. The administrative judge reviewed the unsworn statements submitted on behalf of Mr. Chase, which were

essentially personal references from other personnel with whom he had worked. The administrative judge, however, appropriately assigned those statements minimal weight as they were not from individuals who were present at the time of the incidents in question and did not specifically address those incidents. With respect to evidence submitted by both parties, the administrative judge properly reviewed the statements and testimony, assessed their credibility and relevance in light of the appropriate factors, weighed them accordingly, and found that the charges were proved by a preponderance of the evidence. We find no reversible error in the Board's consideration of the evidence before it.

III

Mr. Chase also contends that his penalty was too sever for the offense. Our review of a penalty imposed by an agency is "highly deferential." Webster v. Dep't of the Army, 911 F.2d 679, 698 (Fed. Cir. 1990). We will overturn HHS's penalty determination only if it is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." O'Neill v. Dep't of the Navy., 220 F.3d 1354, 1365 (Fed. Cir. 2000) See also Marzares v. Dep't of the Navy, 302 F.3d 1382, 1382 (Fed. Cir. 2002)("Unless the penalty is totally unwarranted or grossly disproportionate to the misconduct, we will not overturn it.").

The administrative judge found that (1) Mr. Chase's offenses were sufficiently serious to justify the sanctions imposed; (2) his conduct adversely affected the efficiency of the agency's operations, in part because it caused coworkers to be reluctant to approach and depend on him; (3) his conduct affected the perception of the agency by those receiving services form it; (4) he was previously disciplined for failure to demonstrate courtesy and consideration to a patient, having been suspended for 5 days on January 24, 2000; and (5) he had been counseled and warned on numerous occasions about his inappropriate behavior. Both the agency and the administrative judge properly considered the relevant Douglas factors to evaluate whether the penalty was reasonable, including the quality and length of his 12-year service. Under the circumstances, we cannot say that the agency abused its discretion in imposing a 30-day suspension and we will not disturb the agency's decision to impose that penalty.

## APPENDIX C: MEMO TO VERONICA DILLON, EEO, INDIAN HEALTH SERVICE, FORT BELKNAP HOSPITAL, FORT BELKNAP, MT 59526, DATED AUGUST 18, 2001

***

Norman Chase RR1 Box 71 Harlem, MT 59526
Attachment to question # 30.b. (I)
(handwritten at top of page)

18 August 2001

MEMORANDUM FOR: Veronica Dillon, EEO, Indian Health Services, Fort Belknap Hospital, Fort Belknap, MT 59526

SUBJECT: EEO Complaint-GENDER DISCRIMINATION

This is my written request for a Formal EEO Complaint to be filed within the Clinic, HIS, Fort Belknap Hospital, Fort Belknap, MT.

I am basing this complaint on the fact that I am the only MALE NURSE within the staffing in the Fort Belknap Clinic and feel that recent and former complaints and disciplinary actions taken against me by my immediate supervisor are based entirely on my gender and for no other legitimate reason.

I am requesting that a FORMAL EEO Complaint be filed at this time and I be afforded the necessary forms, regulations and guidance to file this complaint with assistance from the EEO Office/Coordinator.

s/Norman M. Chase
9:38 A (M)
8/17/01
Stamped: RECEIVED 8/17/01 vad/nrl 8:30:01 @ 9:24 mg

## APPENDIX D: HANDWRITTEN STATEMENT BY SUZANNE COCHRAN, RN, DATED OCTOBER, 19, 1999

***

(handwritten)
Oct. 19,99

On October 5, 99 around 8:30 am, Norman Chase brought Michaela Horn to my screening room to be screened. He stated "I couldn't get much out of her." I told him I would ask her questions. Looking at Michaela. I sensed something was wrong. I asked her what was the matter. She started crying and said that man yelled at me. I told her not to let him get to her and called her mom to come over because she was upset. I then proceeded to screen her and inquire why she was here

At the time Norman was triaging her I was in my screening room and did not hear any yelling or raised voices.

s/Suzanne Cochran, RN

## APPENDIX E: LETTER TO CHERYL HORN FROM NORMAN CHASE, RN, DATED OCTOBER 7, 1999

***

DEPARTMENT OF HEALTH & HUMAN SERVICES
PHS Indian Health Center
Ft. Belknap Box 67, RR 1
Harlem, Montana 59526

RR1 Box 38
Harlem, MT 59526
10-07-99

Dear Cheryl Horn,

I would like to sincerely apologize for any discomfort that I might have caused you and your daughter. In the morning rush of getting as many people triaged as soon as possible I initiated the triage process without the benefit of an accompanying parent or consenting adult. After I asked Michaela to please have a seat, I asked her why she was going to be seen by the doctor. This very shy lady would not look up form the floor or answer. I thought that perhaps she had not heard me. My voice is low and I often have people ask me to repeat myself. I raised my voice in hopes that Michaela would tell me why she was going to see the doctor. After a while Michaela indicated right foot and left lower extremity pain. I asked her about any recent injury. After no response I led Michaela to the vital sign area to be screened by Suzanne Cochran. At no time did I see Michaela cry.

Again I sincerely apologize for any discomfort I have caused your daughter. My intentions are certainly not to embarrass or harm my patients. I also do not want to appear rude or insensitive to them. I want to thank you for bringing this matter to my attention.
Sincerely,
s/Norman Chase, RN

## APPENDIX F: LETTER OF SUPPORT FROM INDIAN HEALTH SERVICE PHYSICIAN, DR. WILLIAM BRADSHAW, M.D., DATED DECEMBER 3, 1999

***

DEPARTMENT OF HEALTH & HUMAN SERVICES
PHS Indian Health Center
Ft. Belknap Box 67, RR 1
Harlem, Montana 59526
December 3, 1999
To Whom It May Concern:

I am aware that Mr. Norman Chase RN has been accused of yelling at a 13 year old female in the out patient clinic. I cannot support or refute this accusation. I can however, after having worked as locum tenes physician at Fort Belknap for the preceding 20 months offer my observation of Mr. Chases performance. I will limit these observations to the out patient setting where I have exclusively observed the nurse on question.

During the above mentioned period I have never observed Mr. Chase anyway showing even a suggestion of disrespect towards a patient or even another staff member. I have found his performance of his nursing duties well within bounds and levels of competence set by the Department of Nursing. I have never witnessed any medication errors or clinical misadventures per Mr. Chase.

I have however perceived an overall negative perception within the Dept. of Nursing towards Mr. Chase, that seemed to well predate my arrival at Fort Belknap in March 1998. I have worked well with Mr. Chase as well as with some of his most stanch critics. I have become increasing aware of an air of hypercritically towards Mr. Chase that seems incongruous with my own experience.

I have become aware in the course of that time of Mr. Chases history 14 years of sobriety and of his previous diagnosis of PTSD.

These medical factors may well play a part in some of the difficulties Mr. Chase has encountered.

I suspect that the perception of what has been said about the event with this 13 year old girl is strongly influenced by preexisting perceptions of Mr. Chase.

Please feel free to contact me if you have any questions.

Sincerely,
s/William Bradshaw, M.D.

## APPENDIX G: LETTER OF SUPPORT FROM INDIAN HEALTH SERVICE PHYSICIAN, DR. DAVID J. ABBOTT, M.D., DATED NOVEMBER 1, 2001

***

DEPARTMENT OF HEALTH & HUMAN SERVICES
PHS Indian Health Center
Ft. Belknap Box 67, RR 1
Harlem, Montana 59526
November 1, 2001

To Whom It May Concern:
Re: Norman Chase, R.N.

I have worked with and known Norman for a period of about five years. Our working relationship has been mostly in walk in clinic, or occasionally in the Emergency Room. I have confidence in Norman's professional abilities, and feel he has carried out his duties with competence and dispatch when he has been providing nursing care to patients for whom we share responsibilities.

I have noticed many instances of friction between Norman and his nurse colleagues. I have perceived that in most of these situations, there have been disagreements about provision of backup when the need for nursing service exceeded his physical abilities (dressing changes, shots to give, lab orders, x-ray orders, making appointments) closing with patients for dismissal. I recognize that different people handle these situations in a variety of ways. Norman engages with most of our patients and is an advocate for them. I feel comfortable working with him and would like to continue to do so in the future.

s/David J. Abbott, M.D.

## APPENDIX H: LETTER OF SUPPORT FROM INDIAN HEALTH SERVICE PHYSICIAN, DR. ETHEL MOORE, M.D. DATED NOVEMBER 1, 2001

***

November 1, 2001
To Whom It May Concern:

Ref: Norman Chase

Norman Chase is employed as a nurse at the same HIS facility where I am employed as a family physician. We have worked together for about ten years.

Norman has very good clinical skills. I trust his triage skills. I feel comfortable working with him in ACLS/ATLS emergency situations.

Norman can be assertive when he feels that he is right. He is supportive of the patient's rights, which can be offensive to some co-workers.

Lastly, at times, the rules that apply to other nurses do not apply to Norman.

If you have further questions, feel free to contact me at 406-353-2431

Sincerely,
s/Ethel Moore, M.D.
RR11, Box 77
Harlem, MT 59526

## APPENDIX I: LETTER OF SUPPORT FOR NURSE PRACTITIONER PROGRAM FROM INDIAN HEALTH SERVICE PHYSICIAN, DR. MICHAEL A. OGBOH, D.O. DATEDAUGUST 26, 1992

***

DEPARTMENT OF HEALTH & HUMAN SERVICES
PHS Indian Health Center
Ft. Belknap Box 67, RR 1
Harlem, Montana 59526
August 26, 1992
To Whom It May Concern:
RE: CHASE, Norman

Dear Sir/Madam:

I am respectfully writing in support of the application for admission to the Nurse Practitioner Program by Mr. Norman Chase. Mr. Chase is currently working as an ambulatory care nurse at Fort Belknap Indian Hospital.

I have worked with Norman for the past eighteen months at the Fort Belknap Hospital. Norman has always conducted himself as a professional man with strong self-motivation. He is energetic and reliable. His leadership abilities, judgment, compassion and sensitivity are all characteristics which I believe point to a successful candidate for the Nurse Practitioner Program.

I highly recommend Norman for a position in your Nurse Practitioner Program.

Sincerely,

s/Michael A. Ogboh, D.O.,
Family Practitioner

# APPENDIX J: PERSONNEL DIRECTORY OF INDIAN HEALTH SERVICE, BILLINGS AREA DATED FEBRUARY 18, 2003

***

INDIAN HEALTH SERVICE-BILLINGS AREA OFFICE PERSONNEL DIRECTORY
(Complete director available upon request)

Note: All key personnel which the petitioner must work with in handling requests and administrative roles listed below are female.

PERSONNEL MANAGEMENT
Kim Nicholson

OFFICE OF HEALTH CARE
Rita Harding, RN
Jaloo Zelonis,RN

OFFICE OF ENVIRONMENTAL HEALTH ENGINEERING
Cheryl Heinrich

## APPENDIX K: PERSONNEL DIRECTORY OF FORT BELKNAP INDIAN HEALTH SERVICE, FORT BELKNAP RESERVATION, MONTANA DATED JULY 24, 2003

***

PERSONNEL DIRECTORY
Fort Belknap Indian Health Service
Fort Belknap Reservation, Montana July 24, 2003

(Note: Male personnel identified in parenthesis)

ADMINISTRATION
Brockie, Daryl
Mount, Mary
Redfox, Fonda

NURSING SERVICE (RNs listed only)
Director of Nursing
McGuire, Kathleen

Staff RNs
Bell, Desiree
Chase, Norman (Male, Native American RN)
Dirden, Roxian
Fuzesy, Kim (Male Caucasian RN)
Handy, Hillary
Hanses, Joe (Male, Caucasian RN
Hawley, Gloria
Ironmaker, Cheryl
LaTray, Joan
Leo, Simon
Murray, Duane (Male, Caucasian RN)
Olver, Kathleen
Patterson, Evelyn
Shupe, Roberta
Williams, Rita

**APPENDIX L: ARTICLE, DOMROSE, C.**
**MEN AT WORK, *NURSE WEEK***
**DATED AUGUST 27, 2003**

**http://www.nurseweek.com/news/features/03-08/manenough.asp**

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## MEN AT WORK

Thanks in part to campaigns designed to appeal to masculine sensibilities, more men are entering nursing-and discovering the joys of a profession traditionally dominated by women.

By Cathryn Domrose, August 27, 2003
http://www.nurseweek.com/news/features/03-08/manenough.asp

At the most recent American Nurses Association annual convention, Gene Tranbarger, Ed.D., RN saw signs that times might finally be changing for men in nursing: They were on the bathroom doors.

Tranbarger, president of the American Assembly for Men in Nursing, has attended ANA conventions since the late 1950s. "One of the first actions was to declare all the bathrooms female," he said-a common practice at conventions of any group were most members are women. Men had to go to their hotel rooms or into another building to use the facilities, he said.

This year, he saw signs on every men's room door reading, "Ladies, out of consideration for our male colleagues, please do not use this room."

It seems like a little thing, Tranbarger said, but he sees it as a tremendous change from even two or three years ago. The image of nursing as an exclusively women's domain finally may be going the way of crisp white uniforms and hats. "I think more and more men are being welcomed into the profession and are being sought out," Tranbarger said.

Driven by the nursing shortage, nursing schools and hospitals are making a concerted effort to woo a previously untapped base of

men, as well as trying to change the image of nursing as a women's profession. Campaigns with slogans like "Looking for a Few Good Men" and "Are You Man Enough to be a Nurse?" have attracted national media attention, with stories in The New York Times and the Associated Press.

According to the March 2000 National Sample Survey of Registered Nurses, 146,902-or 5.4 percent-of the estimated 2.7 million RNs in the United States were men. More recent figures from the U.S. Department of Labor show numbers as high as nearly 7 percent, up from less than 3 percent in 1980. The number of men going into nursing is expected to continue to increase, as nursing jobs remain plentiful in an unstable economy.

**Attitude Adjustment**

But, as some men point out, recruitment is not enough. To successfully bring in and keep men in nursing, they say, the profession needs to examine its own attitudes about why men have been excluded in the past, and work to eliminate factors that might be keeping them away or making them drop out now.

The last time Tranbarger remembers so much publicity about men in nursing was in the '50s, when he and other men were pioneering the male movement into a profession that had been almost exclusively female since the beginning of the 20th century. "Then, we were like Siamese twins," he said. "We were an oddity."

No longer. Nursing schools are changing the colors and photos on their brochures, eliminating the pastel pinks and lavenders and the pictures of smiling young women. Recruiters for schools and hospitals are placing ads in sports magazines and at sporting events.

A Harley rider, a black belt, a snowboarder and a combat medic are among the nine nurses staring toughly from billboards and buses under the headline, "Are You Man Enough...to be a Nurse?" The poster, which has been distributed to middle and high schools throughout Oregon, is part of a recruitment campaign by the Oregon Center for Nursing, a nonprofit organization dedicated to solving the nursing shortage.

The "Man Enough" campaign touched a national nerve when it was unveiled last fall, said Deborah Burton, Ph.D., RN, executive

director of the Oregon Center for Nursing in Portland. She recently has sold the rights to the poster to two corporations, one in Louisiana and one in Southern California, that plan to use it to recruit men into nursing in those areas.

The Oregon center has been deluged with calls from guidance counselors, young men and their parents and older men who are looking for a second career, she said. Guidance counselors who have the poster on their wall tell Burton it still generates more interest and discussion among students than any other promotional material they have received.

Besides the poster and school visits from the nine featured nurses, the Oregon center also has organized a Saturday class for high school boys called "Men in Scrubs," taught by male nurses and nursing students. "We fill every class and there's always a waiting list," Burton said.

The University of Iowa College of Nursing publishes a 10-page booklet, also available online[www.nursing.uiowa.edu], aimed at potential male students. It includes a timeline of the history of men in nursing, testimonials from male nurses and answers to questions like: Will I have to take orders from physicians? What kind of income can I expect as a nurse? The school also has created a Men in Nursing Mentoring Task Force that plans to use male alumni to promote its programs and to create a support group for male students.

The publication and other promotional materials are aimed at parents as well as potential students, said Kennith Culp, Ph.D., RN associate professor at the University of Iowa College of Nursing in Iowa City, and a member of the task force.

"Parents often actively discourage their sons from going into nursing," Culp said. "I still hear it from my mother and I've been practicing for 20 years."

Samuel Clemmons,RN, diversity coordinator for Caldwell Memorial Hospital in Lenoir, N.C., is working with church leaders in his community to convince African-American parents that nursing is a good career for their sons as well as their daughters.

African-American men are one of the most underrepresented groups in nursing in his rural community, Clemmons said, and the most difficult to recruit.

"They say that they do not see themselves doing this kind of work," Clemmons said. But many in the community are looking for jobs. "We want to be there for them, to make them the offer of a possibility for them to consider."

Many nursing schools are using male students and alumni as recruiters in high schools and middle schools. "The males have always been my best recruiters," said Dani Eveloff, MS, RN, recruitment coordinator for the College of Nursing, University of Nebraska Medical Center. "They're a minority in nursing, and they know it helps if a male talks to another male."

When they talk to potential male nursing students or nurses, many recruiters emphasize career flexibility, technology, excitement and money, as well as the satisfaction of caring for
People. "We never used to talk about money in nursing, but that's what interest many men and boys," Eveloff said. She recently amazed her 8- and 10-year-old nephews by telling them that advanced degree nurses could make up to $150,000 a year. "They seemed interested and I know it was because of the money."

Between one-quarter and one-third of nursing students at the University of Texas-Houston Health Science Center are men, well above the national average of 8.3 percent of nursing school students reported in 2002 by the American Association of Colleges of Nursing. The university eliminated its pastel-colored recruiting materials and began including photos of male nurses a few years ago, said Renae Schumann, Ph.D., RN, coordinator and assistant professor of acute and continuing care at the university. "We don't have quotas," she said. "We just have a problem that's appealing to men." Many have a degree in another field, she said, and have researched nursing schools extensively. Many told her they were attracted by the university's access to nationally known clinical facilities. Last year, she said, the school had 900 applications for 100 spots.

"The people at UT make men feel very welcome here," said Ruben Herrera, a senior nursing student at the university who has a degree in health care administration and worked as a manager for six years before deciding to become a nurse. "Even in the clinical setting, I

haven't felt anything that would make me think twice about my career choice."

**Mixed Message**

Not everyone agrees with all aspects of the new recruitment campaigns. Some find the macho approach a little over the top. Others worry that by emphasizing money, excitement and technology, nursing will attract those who aren't interested in caring for people.

"I personally prefer the Johnson & Johnson approach," said Bruce Wilson, Ph.D., RN, a professor in the department of nursing at the University of Texas-Pan American in Edinburg, who has written extensively about the history of men in nursing. The J&J campaign, launched last year, includes profiles of male nurses explaining why they decided to enter the field and why nursing is a great career. "It portrays men in a wide variety of nursing roles," Wilson said. "It doesn't matter whether or not you scuba dive."

Herrera has spoken to students and Hispanic groups about nursing, and doesn't believe that profession requires much selling. "All the elements are there for a good career, whether you're a man or a woman," he said. "If you present all the facts, it will shine through."

But Burton argues that previous campaigns haven't appealed to men enough to overcome an ingrained public perception that men in nursing must be somehow feminine. Even the J&J campaign, which she considers gender neutral, was not enough to overcome that image, she said. When junior high and high school students see the poster of nine seriously macho men hanging on the door of a counselor's office, their first comment is, "'They can't be nurses,'" she said. "But they are. And they'll come to your school to prove it."

Burton said she has heard objections to the "Man Enough" campaign from some who think it undermines what they see as the feminist element of nursing, and some who think it's unfair that a man would be accepted into a competitive nursing program over a woman with equal or greater qualifications. The last objection concerns her the most, she said, because she doesn't want anyone to feel excluded from nursing.

No single approach or group of people is going to solve the nursing shortage, said Richard Brock, MA, RN, director of medical/

surgical nursing at Good Samaritan Hospital in Los Angeles. He welcomes a variety of recruitment methods aimed at a variety of people.

"When you're trying to get people's attention, you can't hold back," he said. What's important, he said, "is getting good people-men and women-into the field."

## Career of choice

A few years ago, Brock interviewed 100 men about why they became nurses. He received many interesting answers. Rock musicians said they wanted a steady job between gigs. One man said he decided to become a nurse so he could meet women. Brock himself, a former teacher, went into nursing thinking it would be his summer job.
But those reasons faded after they became nurses. "What kept people in was that they got so fascinated with their work, he said. "They cared about their colleagues, they cared about their patients. It takes a really uncommitted person not to get sucked up into it."

Cormac O'Sullivan, MSN, CRNA, never envisioned going into nursing, even though his brother and sister did. He describes himself as a hammer-and-saw kind of guy. His father was a maintenance man, and O'Sullivan gravitated to fixing athletic fields and working at a sewage plant over hospital work. He considered becoming an architect or an engineer. But when he got to college, he realized he wanted a degree that would give him a meaningful, well-paying job right out of school. Nursing fit that bill.

He spent about eight years working in Level One trauma centers around the country. He loved the fast pace, the technology, the excitement. But eventually the intensity of inner-city emergency rooms began to get to him. He and his wife wanted to move to a small town to raise their children.

"I coded too many patients," he said. "I'd seen too many people die and they just kept coming. I started thinking about getting into advanced practice nursing."

O'Sullivan went back to the University of Iowa and became a nurse anesthetist. He works as a staff nurse anesthetist at University of

Iowa Health Care and is the associate director for the university's nurse anesthetist program. He said he derives great pleasure when he wakes patients after surgery who often can't believe the ordeal is over, when he watches them walk out the door with their families. He also participates in difficult surgeries that provide the excitement he loved so much in emergency care.

"Nursing has been a wonderful career for me," O'Sullivan wrote in an e-mail explaining why he chose the profession. "I have been challenged at many different levels and been able to constantly grow, expand and advance, while maintaining patient contact, which I greatly enjoy."

**Long way to go**

But he has not seen much change in the profession from the days when he was the only man in a class of 100 women, he said. Salaries and respect for nurses have not increased much. Hospital administrators still tend to think, "a nurse is a nurse," without acknowledging the specialization and skill required for the job, he said.

"It might be more socially acceptable" for a man to be a nurse now, he said. That and the changing economy may bring more men into nursing.

Keeping them, however, is another story.

"We are definitely making a better attempt to recruit men into nursing, but we are still far behind," said Jerry Lucas, RN, publisher of Male Nurse Magazine, a magazine for male nurses that is expected to launch in the fall. "We get them in, but we can't keep them in."

Some studies have shown that men drop out of nursing school and the profession at a greater rate than women do, although reasons for this are unclear and need further research. One possibility is stress resulting from gender discrimination; another is that the work does not meet expectations-a common reason for new female nurses to drop out.

In an online survey Lucas conducted and published on Male Nurse Magazine's Web site, 113 of 126 respondents said they did not feel that men were "fairly represented within nursing." More than two-thirds of men who responded to a write-in survey said they thought men were overlooked in the profession. Men might be more likely than

women to leave a job if they don't feel respected and valued, Lucas said.

Studies also show a greater percentage of men in management, which some men say is because men are pushed away from bedside care. Nursing schools have few or no male faculty members. Some men report harassment at work or in school by female colleagues or professors. Male and female nurses tell stories about men not being allowed in labor and delivery rooms, not because patients objected but because staff nurses or instructors disapproved.

But many male and female nurses say that although they have encountered or heard about gender discrimination against men, they believe it is the fault of a few individuals rather than a pervasive problem. Most nurses, they say, don't care who you are as long as you can do the job. Most patients don't care either.

"Decades ago, there was a bias against men in nursing," said Polly Bednash, Ph.D., RN, FAAN, executive director of the American Association of Colleges of Nursing. "I would be surprised to see any of those biases continue to exist" as more men move into the profession. "I see strong respect and sharing between men and women."

Nurses also admit they need to work to overcome the gender bias that became automatic in the 1900s. Burton said she still forgets sometimes and refers to all nurses as "she," even though she makes a conscious effort not to. Textbook with pictures of all female nurses need to be updated.

If nursing wants to become diverse, it needs to portray itself as a diverse profession," Wilson said. "In its language, in its textbooks, in its journals." For the first time, he said, he is starting to see a change. "I'm starting to see articles in some of the major journals saying perhaps we should let men into nursgin."

Burton said that in her region at least, she's hearing fewer horror stories about men facing discrimination in nursing. Her next campaign, which begins in the fall, will focus on bringing minorities of both sexes into the profession.

When she' walking around the campus of the University of Portland, a private school, Burton sometimes comes across young men visiting the campus with their parents. They usually are lost and need

directions. While helping them, she asks where they are from, what the son plans to study. If the student says he doesn't know, she asks if he's ever considered nursing.

The responses are as regular as clockwork, Burton said. The father laughs. The mother says,
"I don't think so."

The boy thinks for a moment and says, "I don't know, why not?"

Like a sign on a bathroom door, it's a small thing, but it could mean a great deal to the future of nursing.

**APPENDIX M: ARTICLE, HOPKINS, M.**
**CRITICAL CONDITION, *NURSE WEEK***
**DATED MARCH 12, 2001**

**http://www.nurseweek.com/news/features/01-03/shortage.asp**

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## CRITICAL CONDITION

An acute worldwide shortage of nurses is expected to become much worse in the years ahead

By Mary Elizabeth Hopkins
March 12, 2001
http://www.nurseweek.com/news/features/01-03/shortage.asp

Nurses and health care institutions already are struggling with it and searching for solutions. Experts say improving the workplace and polishing the image of nursing are among the steps that must be taken to avert a potential catastrophe in health care.

In a military town, Suzanne Purdy, MBA, RN, partially handles rapid staff turnover by hiring married registry nurses. The benefits of a full-time job aren't as much of a lure for them, she said, if their military spouses supply the medical/dental coverage.

But the expense and stress of constantly training new part-time registry nurses takes its toll on her.

Out of necessity, Purdy, vice president for patient care at Paradise Valley Hospital in San Diego, a Christian-owned, nonprofit community hospital with 302 beds, also hires new grads for positions in the definitive observation unit.

In the past, Purdy would have held out for more experienced nurses. Some of the new hires do come from skilled nursing environments but haven't worked in acute care for a while, she said. They usually require special refresher education and clinical precepting to return to the bedside. "Then what may happen is they'll leave," she said.
Studies indicate that loyalty is diminishing among Gen-Y and Gen-X nurses, she added. Job-hopping, largely frowned upon by baby boomer

nurses, is the norm among their younger cohorts, who often stay exactly as long as their $3,000 to $5,000 signing bonuses say they must, Purdy said. "From my experience, the nursing shortage is acute–extremely acute," she said.

**The alarm sounds**

Purdy is far from alone. News reports from across the country paint an alarming picture of an acute worldwide nursing shortage that promises to become much worse in the years ahead.

Knowledge of the problem saturates most nurses, but solutions still may look murky. Ominous results of the latest National Sample Survey of Registered Nurses show the supply of nurses–thoroughly reported as insufficient–will slow even further. Sigma Theta Tau International Honor Society of Nursing calls the shortage a major threat to the future of the world's health care system. It's not just a U.S. crisis. Australia, Canada, and parts of Europe and Asia also report problems.

**Ominous effects**

The most convincing evidence of the nursing shortage is the rapidly rising vacancy rates in every region of the country.

Some hospitals are canceling nonurgent surgeries, closing beds or units and diverting emergency room patients. As a result, some hospitals and nursing homes are unable to admit patients and some home care agencies are unable to take on new clients.

The Texas Hospital Association, for instance, reports rising RN vacancy rates across the state that range from 10 percent to as high as 18 percent in some specialty areas.

In the Dallas/Fort Worth area, the RN vacancy rate is 10.4 percent, while the vacancy rate among RNs working in intensive care units is an alarming 16.9 percent (up from 12.7 percent in 1999). Generally, according to the association, vacancy rates of 9 percent or above are thought to indicate a significant shortage.

In November, nursing shortages forced Johns Hopkins Hospital in Baltimore to leave 10 percent of its surgical beds unfilled, delaying or canceling some surgeries.

In February, Saint Elizabeth Regional Medical Center in Lincoln, Neb., reported an 11 percent vacancy rate in its 435 registered nursing and licensed practical nursing positions.

**Why now?**

Although nursing shortages have occurred before, today's is different because it is being driven not just by a diminishing supply of new talent entering the profession, but by a growing demand for health care as the baby boom generation approaches its golden years.

The latest numbers from the American Association of Colleges of Nursing indicate that enrollments in five-year baccalaureate nursing schools dropped 16.6 percent during the past five years, from 72,452 in 1996 to 60,443 in 2000. Within 10 years, 40 percent of working RNs will be 50 or older, according to Sigma Theta Tau.

As those RNs eventually retire, the supply of working RNs is projected to be 20 percent below requirements by 2020.

Today's shortage also occurs at a time when nursing has lost some of its luster as a career opportunity, partly because nursing is a traditionally female profession and today's women have more options than they did before. Women graduating from high school in the latter part of the 1980s and during the 1990s were 35 percent less likely to become RNs compared to women in the 1970s, according to the Texas Hospital Association.

What's more, experts say changes in the delivery of health care in a managed care environment have caused some nurses to become frustrated. Their complaints have discouraged newcomers from joining the profession. In a survey released last month by the American Nurses Association, 54 percent said they would not recommend their profession to their children or their friends.

The ANA survey found that 75 percent felt the quality of nursing care where they worked had declined during the past two years. A majority, or 56 percent of the 7,299 nurses surveyed, said they had less time to care for patients. Moreover, 40 percent said they would worry about sending a family member or someone close to them to be cared for at the facility where they work.

The shortage is far from universal at this stage, however. It tends to be felt hardest in isolated rural areas, depressed urban environments

and key specialty areas. The numbers indicate that the shortage also is more likely to be felt in Western and Southern states than it is in the East and Midwest.

**Solutions on tap**

Nursing schools, the obvious route to replenish the pipeline, have a hard time funding adequate numbers of enrollees. Judy Papenhausen, Ph.D., MSN, chairwoman of the department of nursing at California State University, Los Angeles, said new enrollees in the department have increased from 50 to 70 per year. She'd like to double those numbers, but funds are scarce.

The requisite low student-to-teacher ratios in nursing schools mean costs are much higher than in some other departments, such as English literature. "With more money from the Chancellor's office or from the federal government, the schools could admit another whole class," Papenhausen said.

Losing good nurses to other states means that recruitment and retention strategies at St. Alexius Medical Center in Bismarck, N.D., must focus on graduates of the two nursing schools in town.

Linda Knodel, MHA, RN, assistant administrator/director of nursing at St. Alexius, said the hospital tries to keep the local graduates, known for their good work ethic, from accepting offers elsewhere by offering scholarships, serving as guest faculty at the local nursing schools, running job shadowing programs for junior and senior nursing students, providing scholarships for junior and senior students, and offering competitive wages.

Purdy said her adjusted hiring methods might include using a different skill mix to avoid burning out existing staff nurses.

"My hospital is all RNs, but I'm evaluating using LVNs or CNAs as nurse extenders. Then I always encourage them to move up their credentials a notch," she said.

Given the shortage, she said it's not realistic to think she can hire all BSNs with clinical experience and the intent to stay.

**Underlying causes**

According to the newly released preliminary findings of the National Sample Survey of Registered Nurses, California trails only Nevada in

the number of registered nurses per 100,000 population. The national average is 782 employed RNs per 100,000 population.

When the survey was conducted last March, California had 544 employed RNs per 100,000 and Nevada had 520.

On the top end of the scale, the District of Columbia had 1,675 employed RNs per 100,000 population, while Massachusetts had 1,194 and South Dakota had 1,128.

So while no state may be immune from the shortage, especially in key specialty areas, the numbers have led researchers to conclude that some states have more work to do–and more to fear–than others. In California, for example, researchers estimate that the state will face a shortage of 25,000 RNs within the next five years.

**Survey results**

Preliminary results of the National Sample Survey give nurses a clear idea of approaching patterns in the crisis.

"We have seen a decline in enrollments and graduations. Nurses are getting older and leaving the workplace, and we're seeing a salary issue. If you look at the salary table, there hasn't been much growth on a real scale since 1992," said Denise Geolot, Ph.D., RN, FAAN, director of the Division of Nursing in the Bureau of Health Professions, part of the Health Resources and Services Administration in Washington, D.C., which released the preliminary survey results in February. The HRSA falls under the umbrella of the Department of Health and Human Services.

"The apex of the age curve has moved, so we have 68.3 percent of nurses over 40, which is a real concern. We have a small percentage under age 30," Geolot said.

The supply of nurses has increased during the past four years, Geolot said, but at a slower rate than in the past. It's the lowest increase since 1977. That reflects the lower number of grads entering the workforce vs. a larger body of exiting nurses.

But, Geolot said, "We're pleased that more men are entering. Male nurses made up 5.4 percent of the workforce in 2000, whereas in 1996, they made up 4.9 percent of it."

The number of racial and ethnic minorities in nursing also has increased, she said. In 1996, they made up 10.3 percent of the workforce vs. 12.3

percent in 2000. Still, Geolot said, those numbers are lower than she'd like to see.

HRSA will funnel the data from the National Sample Survey into a forecasting model to be released this summer, which will further help predict nursing supply and requirements in 2010, Geolot said.

The Web site for the survey is www.bhpr.hrsa.gov. Since 1977, HRSA has–every four years–released extensive and comprehensive sources of statistics on characteristics of all nurses with current licenses to practice, Geolot said. The 2000 survey went out to 54,000 nurses. Of those, 4,520 were excluded because of duplicate licensure, so the survey polled a total of 49,480 nurses, or 72 percent.

Of course, Geolot said, there's lots of interest in looking into solutions about the future; many states are investigating strategies and congressional hearings lately address legislation toward reducing the shortage.

**Improving the image**

The good news is that much already is being done in an effort to reverse the trend.

In Massachusetts, unions and employers are pushing for the Clara Barton Act proposed by state Sen. Richard Moore, D-Uxbridge, who heads the Legislature's joint committee on health care. Named for the Massachusetts nurse who helped to professionalize nursing, the bill would provide $25,000 starting bonuses over several years to new nurses in the top 15 percent of their classes, similar to bonuses given to teachers.

In Nebraska, Saint Elizabeth Regional Medical Center instituted a three-part program for new nurses in August. It includes a preceptor program to help new hires with their clinical and technical skills, a mentoring program to help them adjust to hospital culture and personalities and a commitment program with financial incentives ranging from $500 to $1,500 to stay for three years.

In Texas, state Sen. Mike Moncrief, D-Forth Worth, and Rep. Patricia Gray, D-Galveston, have introduced the Nurse Shortage Reduction Act of 2001. The legislation, among other things, would double nursing school capacity during the next five years in a state where thousands of qualified applicants are being turned away.

Two years ago, according to the Texas Hospital Association, a lack of budgeted faculty positions was the primary factor in forcing nursing schools to deny admission to 2,225 qualified applicants to associate degree or diploma programs, and to 788 qualified applicants to baccalaureate and master's programs.

Dorel Harms, RN, vice president of professional services at the California Healthcare Association, emphasized late last year the importance of recruitment at nursing schools. The California Nursing Outcomes Coalition is addressing the images of nursing and how nurses are recruited, Harms said.

Patricia McFarland, MN, RN, executive director of the Association of California Nurse Leaders, said late last year, "We have to do an imaging campaign. We need to work with young people to dispel a lot of myths about nursing. We need to attempt to bring [prospective students] in before the freshman year in high school.

"I think we need to educate counselors, as well. The role of a nurse is to assess, evaluate and plan patient care. It's a distinct role."

Still, solutions won't be easy.

"This is not just another cyclical shortage of nurses that can be rapidly cured by paying nurses higher wages and enrolling more students in nursing schools," said Edward O'Neil, Ph.D., MPA, director of the Center for the Health Professions as the University of California, San Francisco.

"The aging of the nursing workforce, the upheaval in the health care system and the expansion of career opportunities for women [who make up 94 percent of the nursing workforce in California] are combining to produce a chronic shortage of nurses. That shortage can only be resolved by improving the work environment for nurses and redefining nursing practice."